OMB File No.: PL 180027

ENVIRONMENT AND LAND TRIBUNALS ONTARIO

ONTARIO MUNICIPAL BOARD

BETWEEN:

DENIS RANCOURT

(Appellant)

and

ARTERRA HOMES INC.

(Applicant)

NOTICE OF CONSTITUTIONAL QUESTION

(Re: Section 45(1) of the *Planning Act*, R.S.O. 1990, c. P.13)

March 1, 2018

Dr. Denis Rancourt
(Appellant)

The appellant, Denis Rancourt, intends to question the constitutional validity and applicability of Section 45(1) of the *Planning Act*, R.S.O. 1990, c. P.13.

The question is to be argued for two days starting on Thursday, June 28, 2018, at 10:00 AM, at City Hall, Keefer Room, 110 Laurier Avenue W., Cartier Square, Ottawa, ON K2P 2L7.

OVERVIEW: Section 45(1) of the *Planning Act* sets the limit of jurisdiction for administrative tribunals to authorize so-called "minor" variances from provisions of zoning bylaws. As such, the section delimits a separation between the judiciary (tribunals accountable to the courts) and the legislature (democratically enacted bylaws). The vagueness of Section 45(1) has, in application and interpretation, allowed it to improperly become a tribunal planning instrument, which gives developers whatever they want, transforms neighbourhoods contrary to established character, and vitiates the common law landowner rights (nuisance tort) of established residents. Therefore, Section 45(1) is unconstitutionally vague and of no force or effect. In the alternative, Section 45(1) is unconstitutional because it infringes or denies the appellant's s. 15(1) *Charter* equality or non-discrimination rights.

The following are the material facts giving rise to the constitutional question:

(Set out concisely the material facts that relate to the constitutional question. Where appropriate, attach pleadings or reasons for decision.)

1. The appellant made written submissions to the Committee of Adjustments (the "Committee"), City of Ottawa, opposing a developer's applications for severance consents and so-called "minor variances" to build-up two (2) lots immediately adjacent to the appellant's home, in a modest neighbourhood of detached single-family dwellings.

2. The consent and variance applications were heard together on December 6, 2017. The Committee expressly refused to hear or consider two of the appellant's arguments:
   (a) Challenging the Committee's jurisdiction pursuant to s. 45(1) of the *Planning Act* (the "Act"); and
   (b) Challenging the constitutionality of the *Act* on the grounds of violating the principle of the rule of law.

3. The Committee heard the appellant's other grounds and, by majority, summarily dismissed the objections of the applicant and of other neighbours and authorized all the applications, in deciding that the variances were "minor".

Decision - Minor Variance, Helena Prockiw (Chair), December 15, 2017, File Nos. D08-02-17/A-00304, D08-02-17/A-00310 & D08-02-17/A-00311

Decision - Consent, Helena Prockiw (Chair), December 15, 2017, File Nos. D08-01-17/B-OO374 to D08-01-17/B-00376

4. The Committee *ipso facto* actuated the explicit definition of "minor variance" that is prescribed in the Official Plan (made pursuant to the *Act*), which vitiates the statutory jurisdictional limit imposed by s. 45(1) of the *Act*.

5. Section 45(1) of the *Act* grants the Committee and now the Board limited jurisdiction to hear variance applications; solely if the variances are "minor".

6. The appellant appeals the decisions of the Committee to the Ontario Municipal Board (the "Board"). Appeal hearings at the Board are hearings *de novo*.

7. The consent for severance into three (3) lots and the "minor variance" authorization to construct two (2) new large buildings constitute a substantial development, not a minor adjustment.

8. The variances violate a current interim control bylaw to prevent buildings from being used as or being transformable into *de facto* rooming houses with more than four (4) bedrooms, while a City study is under way.

9. One of the applied-for building plans has six (6) nominal bedrooms, can accommodate ten (10) more bedrooms in basements, dens, and rec rooms (for a total of sixteen (16)), and exceeds the Interim Control Bylaw building floor area limit.

10. Each unit in the particular applied-for building can accommodate eight (8) bedrooms and exceeds the Interim Control Bylaw unit floor area limit by 246%.

11. The Interim Control Bylaw is repealed on July 12, 2018, and may be renewed for another year, while study continues.

12. The variances are also not in conformity with the pre-existing general bylaw, which may be changed following the current said study.

13. The land of the said development was and is in the primary study area of a current joint (city and environment ministry) soil toxicity and former industrial-waste-site footprint study, the results of which are not known, and the first results of which are not expected to be available until "spring 2018".

14. Thus, the land is potentially contaminated and Committee authorization of the said development is in violation of Article 4.8.4, Policies 1, 2 & 3, of the Official Plan made pursuant to the Act.

15. The land is potentially unstable soil or bedrock (former industrial-waste site), such that Committee authorization of the said development is in violation of Article 4.8.3, Policy 1, of the Official Plan made pursuant to the Act.

16. The consents and applications are (the said development is) at odds with the dominant character of the neighbourhood and of the city block, which consists of one and two-story detached single-family dwellings with large backyards, and moderately large front yards with old-growth trees.

17. The said development has the effect of placing the applicant's home directly in boundary contact with a neighbourhood of different character, which is incompatible with neighbourhood backyard life and community, and which is based on the model of large two-and-three-storey whole-lot-footprint units with no yards and with at-boundary entrances to parking garages rather than driveways.

18. The Committee summarily discarded the appellant's liabilities resulting from the said development, which include: in-effect condemning three (3) windows, loss of sky view from the appellant's property, loss of neighbouring backyards, physical high-walling of appellant's backyard on one side at and near the property line, loss (to the appellant and to the neighbourhood) of the large Norway maple tree (*Acer platanoides*), which is on the North-side property line, in the appellant's front yard.

19. Seven other neighbourhood residents claimed personal and public nuisance liabilities, including parking, laneway access and neighbourhood character, which were summarily discarded by the Committee.

20. The Committee adopted an incorrect and unreasonable assessment of neighbourhood character, which ignored the layout and sizes of the homes actually and predominantly present in the neighbourhood. It adopted a cherry-picking-based so-called expert assessment relying on a few large buildings on the neighbourhood boundary, and authorized a "domino-effect" development encroachment.

The following is the legal basis for the constitutional question:

(Set out concisely the legal basis for each question, identifying the nature of the constitutional principles to be argued.)

21. The constitutional status of the principle of the rule of law is beyond question. The rule of law provides a shield for individuals from arbitrary state action, and implies:
    (a) subjection to known legal rules;
    (b) one law for all, including government; and
    (c) adherence to the doctrine against vagueness.

22. The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion.

23. The doctrine of vagueness applies to all law, from the criminal code to regulatory enactments.

24. Any provision of law, which does not satisfy both rationales of the doctrine against vagueness, is invalid and without force or effect.

25. Section 45(1) of the *Act* provides limited jurisdiction to the Committee and to the Board to authorize variance from provisions of bylaws enacted pursuant to the *Act*:

> Powers of committee
> 45 (1) <u>The committee of adjustment</u>, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by

the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained. [Emphasis added]

26. The jurisdiction to authorize variance from bylaw provisions is limited to "minor" variances, which is a true jurisdictional question. The historical jurisprudence of allowing minor variances is to admit the difficulty of imposing codified bylaw conditions on the complexities of real land-use circumstances.

27. Any jurisdictional question must be answered both objectively and correctly; it is not a matter of discretion, however the *Act* does not provide a definition of or a test for the jurisdictional threshold expressed as "minor".

28. This uncertainty in a true jurisdictional question — in which an independent tribunal (accountable only to the courts) is given the power to allow non-compliance with a duly and democratically adopted bylaw — undermines the constitutional division between the judiciary and the legislature, and offends the doctrine against vagueness.

29. Case law applying and interpreting a particular section is relevant in determining whether the section is vague. In the instant case, there are four areas demonstrating vagueness:
    (a) The wording of the section itself, in its statutory context;
    (b) The large body of applications and interpretations of the section by the municipality, the Committee and the Board;
    (c) The applications and interpretations of the section in regulations that derive from the *Act* (Official Plan, Provincial Policy Statement, Rules of Procedure of the Board); and
    (d) The consequences on the ground of opposed and authorized so-called minor variances.

30. Due to its vagueness, Section 45(1) of the *Act* has improperly become a tribunal planning instrument that:
    (a) circumvents democratic bylaw amendment procedures;
    (b) gives non-resident developers virtually whatever they want;

(c) vitiates common law land ownership rights regarding the tort of nuisance; and
(d) produces deleterious consequences on the ground, in neighbourhoods.

31. Therefore, Section 45(1) of the *Act* is unconstitutionally vague.

32. In the alternative, if s. 45(1) of the *Act* is not unconstitutionally vague (which is denied), then it is unconstitutional because in-effect it infringes or denies the appellant's s. 15(1) *Charter* right of every individual's equality before and under the law:
    (a) The applicant's common law property rights are kept intact, whereas the common law property rights (nuisance tort) of the appellant are disregarded and violated.
    (b) The applicant is allowed to be non-trivially non-compliant with the bylaw, whereas if the application is refused all parties are bound by the same bylaw.

33. Section 45(1) of the *Act* is not saved by a s. 1 *Oakes* analysis *inter alia* because the infringements against the individual's *Charter* equality rights are not prescribed by law.

34. In the alternative, s. 45(1) of the *Act* is unconstitutional because in-effect it infringes or denies the appellant's s. 15(1) *Charter* right of equal protection and equal benefit of the law without discrimination. The appellant is discriminated against as an ordinary resident of a dwelling, acting in personal interest to protect his living environment, compared to a non-resident developer acting with a business interest.

35. The said discrimination is established in the body of Committee and Board decisions, is quantitative and palpable, and is thus not saved by a s. 1 *Oakes* analysis. It is not prescribed by law nor demonstrably justified in a free and democratic society.

March 1, 2018

Dr. Denis Rancourt
Appellant

[redacted]
Ottawa, ON, [redacted]

Tel. [redacted]
Email: denis.rancourt@gmail.com

TO The Attorney General of Ontario
Constitutional Law Branch
4th floor
720 Bay Street
Toronto, Ontario M5G 2K1
fax: (416) 326-4015

The Attorney General of Canada
Justice Building
234 Wellington Street
Ottawa, Ontario K1A 0H8
fax: (613) 954-1920

Keith A. MacLaren and Joshua Moon
Lawyers for the applicant Arterra Homes Inc.
PERLEY-ROBERTSON, HILL & McDOUGALL LLP
1400-340 Albert Street, Ottawa, ON KIR 0A5
Email: KMacLaren@perlaw.ca
Email: JMoon@perlaw.ca

Jason C. Kwan
Planner
Ontario Municipal Board
655 Bay St., 15th Floor, Toronto, ON M5G 1E5
Email: jason.c.kwan@ontario.ca

DENIS RANCOURT and ARTERRA HOMES INC.

Complainant (Appellant) (Applicant)

OMB File No.: PL 180027

ENVIRONMENT AND LAND TRIBUNALS ONTARIO

ONTARIO MUNICIPAL BOARD

Proceeding commenced at Ottawa

NOTICE OF CONSTITUTIONAL QUESTION

(Re: Section 45(1) of the Planning Act, R.S.O. 1990, c. P.13)

Dr. Denis Rancourt
[redacted]
Ottawa ON [redacted]
t. [redacted]
(no fax)
email: denis.rancourt@gmail.com

Appellant